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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN LAMBERT,

Defendant and Appellant.

B205551

(Los Angeles County
Super. Ct. No. SA063082)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Richard A. Stone, Judge. Affirmed in part, reversed in part and remanded for
resentencing.

Kelly M. Cronin, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and
Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Steven Lambert of first degree residential burglary, simple assault, exhibiting a deadly weapon and second degree robbery. The trial court sentenced Lambert to state prison for an aggregate term of five years six months as follows: the upper term of five years on the second degree robbery conviction, and a consecutive six-month term for exhibiting a deadly weapon. Pursuant to Penal Code section 654, the court imposed and stayed a six-year prison term on the burglary conviction and a six-month jail term for the assault. Lambert contends the trial court should have stayed the sentence for exhibiting a deadly weapon and improperly imposed the upper term for the second degree robbery conviction. Because we are mandated by Penal Code section 654¹ to remand the matter to the trial court to resentence Lambert on the residential burglary conviction, his other contentions are moot.

FACTS

As Lukus Grace pulled his car into the carport of his parking garage at about 2:00 p.m., on February 8, 2007, he noticed that a couple of the storage units inside were open and their contents were on the ground. The storage units were closed and latched when Grace left earlier that day.

Grace got out of his car and started looking to see if there was someone around. He noticed something fall from the cabinets, and then saw Lambert lying under his neighbor's car. Grace said, "Hey, what's going on, man?" Lambert replied, "Hey, nothing." Grace told Lambert it looked like he was breaking into his neighbor's storage units. Lambert denied it.

Lambert then stood up and started trying to walk around Grace, but Grace blocked his path. Grace told him he was not going to let him go. He called 9-1-1. Lambert went to the front of the car and grabbed a metal object that Grace later found out was a machete. Lambert tried to walk out of the parking garage, and Grace was trying to stop

¹ All further statutory references are to the Penal Code unless otherwise noted.

him. Lambert then held the machete up in the air and swung it at Grace. Grace jumped on Lambert, held him down for a while and the two “were . . . going back and forth.” Grace was holding Lambert’s arm.

Grace’s neighbor, Joshua Dragotta, heard loud yelling. He looked out the window of his apartment to the lower level parking area to see what was happening. He saw Grace being attacked by Lambert so he rushed downstairs to help. He told Grace that Lambert was holding a machete and that he needed to get it out of his hand. That was the first time Grace realized that what Lambert was holding was a machete. The machete was almost 19 inches long. Grace then used both his arms and got the machete out of Lambert’s hands. Dragotta then called the police. Another neighbor, Lisa Balabanian, also heard the ruckus. She also came out of the complex to help Grace.

Grace then walked down the driveway, holding Lambert’s hands behind his back. Lambert said, “Dude, if I had a knife, I could stab you right in the thigh there.” He told Grace to let him go and said that he did not know what he was doing. At that point, Lambert stomped on Grace’s right foot, then leaned forward and hit Grace’s nose with the back of his head with a “head butt.” Lambert’s nose started gushing blood. Grace picked Lambert up and threw him to the ground. Lambert started yelling and cursing. He said, “Get the fuck off me. You don’t know what the fuck you’re doing.” Grace’s nose started to hurt and he was dizzy, but he stayed on top of Lambert. Grace’s neighbors, Dragotta and Balabanian, jumped on Lambert with him and stayed there until the police arrived.

Grace went to the hospital and found out that his nasal bone had been chipped. As a result of the hit, he got black eyes and a swollen nose and was in pain for about a month.

After Lambert was arrested, Grace looked in his storage locker and found that a set of spare keys he had inside was missing. He called Los Angeles Sheriff’s Detective Randy Lopez and described the keys to him. Lopez found Grace’s keys in the property taken from Lambert during his booking.

Los Angeles Sheriff's Deputy Paul Hodgkinson went to the condominium complex and found that four storage sheds in the garage with locks on them had been pried open. Based on the condition of the locks on the cabinets, Hodgkinson opined that Lambert had pried them open using the machete.

In counts 1 through 4, Lambert was charged with first degree residential burglary (§ 459), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), exhibiting a deadly weapon (§ 417, subd. (a)(1)) and second degree robbery (§ 211), respectively. At a trial by jury, the People presented evidence establishing the facts summarized above. Lambert was convicted as charged except on count 2, where the jury found him guilty of the lesser included offense of simple assault (§ 240).

The trial court sentenced Lambert to an aggregate prison term of five years six months, comprised of the upper base term of five years for second degree robbery and a six-month consecutive sentence on the brandishing conviction. On the burglary conviction in count 1, the court imposed a six-year prison term; on the simple assault conviction in count 3, it imposed a six-month jail sentence. Both of those terms were stayed by the trial court, pursuant to section 654.

DISCUSSION

I. The Trial Court Erred by Selecting the Wrong Count as the Base Term

Lambert first contends the trial court should have stayed imposition of sentence for the conviction on count 3, exhibiting a deadly weapon (§ 417, subd. (a)(1)), pursuant to section 654. The Attorney General concedes the error. (AOB 6.) However, because the trial court was statutorily obligated under section 654 to impose sentence on the residential burglary conviction as the base term, and remand for resentencing is required, his contention is moot.

Section 654 specifies that when an act “is punishable in different ways by different provision of law. . . .” a defendant “shall be punished under the provision that provides for the longest potential term of imprisonment.” Here, respondent concedes that the burglary and robbery counts are subject to the prohibition against multiple punishments for the same criminal act. Further, there is no question but that when two counts are

subject to the prohibition against multiple punishments under that section, the trial court must impose sentence for the one carrying the highest punishment. (*People v. Kramer* (2002) 29 Cal.4th 720 (*Kramer*).) Applying these principles here requires that the case be remanded for resentencing, with directions to the trial judge that he impose sentence on the residential burglary count, which carries a triad of two, four, or six years (§ 461, subd. (1)) rather than the current sentence on the second degree robbery conviction, which carries a two, three, or five-year triad (§ 213, subd. (a)(2)).

As in *Kramer*, we do not opine what sentence the trial court should impose within the triad's options for residential burglary. (*Kramer, supra*, at p. 724.) We do note, however, that the original sentence was unauthorized, and thus the trial court may choose to impose the high term of six years for the residential burglary count even though it results in a harsher sentence. (*People v. Serrato* (1973) 9 Cal.3d 753, 764.) In making its determination upon remand, the trial court will be required to exercise its discretion in selecting the appropriate term from the triad, and thus any alleged error Lambert raises pursuant to *Cunningham v. California* (2007) 549 U.S. 270 in his initial sentence is moot.

DISPOSITION

The convictions are affirmed. Lambert's sentence is vacated and the cause is remanded to the trial court with directions to resentence Lambert in a manner consistent with this opinion.

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BIGELOW, J.

We concur:

FLIER, Acting P. J.

BAUER, J.^{*}

^{*} Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.